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In The

Supreme Court of the United States

October Term, 1974

No. 74-1570

CALVIN WILLIAMS and JOSEPH McNEIL,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY and DEPARTMENT OF HEALTH,

Respondent.

APPEAL FROM FINAL JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA

LEWIS KATES
JOSEPH R. LIVESEY
KATES, LIVESEY & EDELSTEIN
Attorneys for Appellants
3232 P.S.F.S. Building
Philadelphia, Pennsylvania 19107
(215) WA 3-8080

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In The

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CALVIN WILLIAMS and JOSEPH McNEIL,

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY and DEPARTMENT OF HEALTH,

Respondent.

APPEAL FROM FINAL JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA

Your appellants, Calvin Williams and Joseph McNeil, appeal from the judgment of the Supreme Court of Pennsylvania in the above-entitled case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, as yet unreported, appears at Appendix A, *infra*. The dissenting opinion of Mr. Justice Roberts joined by Mr. Justice Nix of the Supreme Court of Pennsylvania, as yet unreported, appears at Appendix B, *infra*. The opinion of the Commonwealth Court of the Commonwealth of Pennsylvania, reported in 12 Commonwealth Court Reports 384 (Pa. 1974), appears at Appendix C, *infra*.

JURISDICTION

The judgment of the Supreme Court of the Commonwealth of Pennsylvania, *infra*, was entered on March 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Whether a State, which has legislatively assumed the obligation to safeguard the health and safety of all workmen employed within its borders can escape responsibility in tort for its negligence and willful and knowing inaction to require the removal of a hazardous condition that caused the permanent injuries herein question by interpretation of its Constitution?

2. Whether the doctrine of "sovereign immunity" as applied by the Supreme Court of Pennsylvania through interpretation of its Constitution, to permit a State which has legislatively assumed the obligation and duty to safeguard the health and safety of all workmen employed within its borders to escape responsibility in tort for its negligence and willful and knowing inaction to require removal of a hazardous condition, is

repugnant to the United States Constitution guarantees of due process and equal protection under the law?

3. Whether a State through interpretation of its Constitution, can immunize itself but not any others including its own sub-divisions from liability in tort, without violating the equal protection clause of the United States Constitution, for its negligence and willful and knowing inaction to require the removal of a hazardous condition causing injuries where that hazardous condition is one which it has legislatively assumed the obligation and duty to safeguard against?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment.

That no person shall be deprived of life, liberty or property without due process of law.

United States Constitution, Fourteenth Amendment.

That no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person from life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania Constitution, Article I, Section XI.

All courts shall be open; and every man for injury done him in his lands, goods, person or reputation shall have remedy by

due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct.

Act of April 9, 1929, P.L. 177, Article XXI, §2102, 71 *Pa. Stat. Ann.* §532.

The Department of Health shall have the power, and its duty shall be:

(a) To protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease;

(b) To cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose, without fee or hindrance, to enter, examine and survey all grounds, vehicles, apartments, buildings, and places, within the Commonwealth, and all persons, authorized by the department to enter, examine and survey such grounds, vehicles, apartments, buildings and places, shall have the powers and authority conferred by law upon constables;

(c) To order nuisances, detrimental to the public health, or the causes of disease and mortality, to be abated and removed, and to enforce quarantine regulations;

(d) If the owner or occupant of any premises, whereon any nuisance detrimental to the public health exists, fails to comply

with any order of the department for the abatement or removal thereof, to enter upon the premises, to which such order relates, and abate or remove such nuisance, as may now or hereafter be provided by law.

Act of April 27, 1905, P.L. 312, §8, 71 *Pa. Stat. Ann.* §1403.

It shall be the duty of the commissioner of health to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease.

The commissioner of health shall cause examination to be made of nuisances or questions affecting the security of life and health in any locality, and for that purpose the commissioner, and any person authorized by him so to do, may without fee or hindrance, enter, examine and survey all grounds, vehicles, apartments, buildings, and places within the State, and all persons so authorized by him shall have the powers and authority conferred by law upon constables.

Act of June 2, 1913, P.L. 396, §14, 71 *Pa. Stat. Ann.* §1443.

All rooms, buildings, and places in this Commonwealth where labor is employed, or shall hereafter be employed, shall be so constructed, equipped, and arranged, operated and conducted, in all respects, as to provide reasonable and adequate protection for the life, health, safety, and morals of all persons employed therein. For the carrying into effect of this provision, and the provisions of all the laws of this Commonwealth, the enforcement of which is now or shall hereafter be entrusted to or

imposed upon the commissioner or Department of Labor and Industry, the Industrial Board shall have power to make, alter, amend, and repeal general rules and regulations necessary for applying such provisions to specific conditions, and to prescribe means, methods, and practices to carry into effect and enforce such provisions.

STATEMENT OF THE CASE

Calvin Williams and Joseph McNeil, appellants herein, are ex-employees of the E. J. Lavino Division of International Mineral and Chemical Corporation (Lavino). Lavino operates a large industrial plant in Philadelphia, Pennsylvania and was engaged in the processing of manganese ore. Manganese ore is a toxic, harmful, deleterious and poisonous substance when inhaled or ingested. Lavino's dust-collecting system was inadequate, hazardous and known by Pennsylvania to be so before appellants became employees.

The Pennsylvania Department of Labor and Industry is charged with the duty of protecting all employees from harm caused by industrial equipment and to protect employees such as appellants from harmful substances. Pursuant to the Act of April 9, 1929, P.L. 177, Art. XXII, §2202; 1956, April 12, P.L. (1955) 1467, §1, 71 Pa. Stat. Ann. §562, Pennsylvania delegated to its Department of Labor and Industry certain prescribed duties relative to safeguarding the health and safety of all employees in the Commonwealth:

> "(g) . . . to receive reports of industrial accidents to persons, and to direct the

> investigation of such accidents, and prescribe means for the prevention of similar accidents;
>
> (h) to issue orders for removing or safeguarding against hazards that may cause accidents to employees, as may now or hereafter be provided by law."

Pennsylvania also vested power in and prescribed the duties of its Department of Health under Section 2102 of the Administrative Code, Act of April 9, 1929, P.L. 177, Article XXI, §2102, 71 P.S. §532 which provides in part that:

> "The Department of Health shall have the power, and its duty shall be:
>
> (a) To protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease;
>
> (b) To cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose, without fee or hindrance, to enter, examine and survey all grounds, vehicles apartments, buildings, and places, within the Commonwelath, and all persons, authorized by the department to enter, examine and survey such grounds, vehicles, apartments, buildings and places, shall have the powers and authority conferred by law upon constables;

(c) To order nuisances, detrimental to the public health, or the causes of disease and mortality, to be abated and removed, and to enforce quarantine regulations;

(d) If the owner or occupant of any premises, whereon any nuisance detrimental to the public health exists, fails to comply with any order of the department for the abatement or removal thereof, to enter upon the premises, to which such order relates, and abate or remove such nuisance, as may now or hereafter be provided by law. . . ."

The duty of the Commissioner of Health to protect the health of the people has also been statutorily promulgated in the Pennsylvania Administrative Code Ancillaries, 71 P.S. §1403 which provides that:

"It shall be the duty of the Commissioner of Health to protect the health of the people of the state, and to determine and employ the most efficient and practical means for the prevention and suppression of disease.

The Commissioner of Health shall cause examination to be made of nuisances or questions affecting the security of life and health in any locality, and for that purpose the commissioner, and any person authorized by him so to do, may, without fee or hindrance, enter,

examine and survey all grounds, vehicles, apartments, buildings, and places within the state, and all persons so authorized by him shall have the powers and authority conferred by law upon constables."

Pennsylvania has also enacted legislation, 71 P.S. §1443, providing its Department of Labor and Industry with power to protect all employees from harm caused by industrial equipment:

"All rooms, buildings, and places in this Commonwealth where labor is employed, or shall hereafter be employed, shall be so constructed, equipped, and arranged, operated and conducted, in all respects, as to provide reasonable and adequate protection for the life, health, safety, and morals of all persons employed therein. For the carrying into effect of this provision, and the provisions of all the laws of this Commonwealth, the enforcement of which is now or shall hereafter be entrusted to or imposed upon the Commissioner or Department of Labor and Industry, the Industrial Board shall have power to make, alter, amend, and repeal general rules and regulations necessary for applying such provisions to specific conditions, and to prescribe means, methods, and practices to carry into effect and enforce such provisions."

Pursuant to this legislative mandate, the Pennsylvania Department of Labor and Industry beginning in or about 1965

conducted an investigation with respect to industrial and plant hygiene and safety for the purpose of prescribing means for the prevention of industrial accidents or illnesses of Lavino's employees at its Philadelphia plant. From 1965 until 1971 the Pennsylvania Department of Labor and Industry conducted numerous and exhaustive surveys to determine how much exposure to manganese ore Lavino's employees were receiving. The results of these surveys confirmed that the amount of manganese dust at Lavino's Philadelphia facility exceeded health and safety standards and was dangerous to the health of Lavino's employees working thereat. The Pennsylvania Department of Labor and Industry despite such evidence of hazard, did not compel Lavino either to correct the dangerous condition or to shut its said facility, but acquiesced in permitting Lavino to continue its hazarous operations without notice of the hazard to its employees, including appellants. During this period of acquiescence appellants became employed by Lavino, and as a direct result of this negligence and failures and refusals to act by the Pennsylvania Department of Labor and Industry, contracted manganese poisoning. Manganese poisoning interferes with the functioning of the central nervous system and in the case of appellants, reduced their physical and mental ability to almost zero. Appellants are permanently and totally disabled.

Appellants commenced suit against the Commonwealth of Pennsylvania in its State courts. The relevant pleadings and docket entries in this action appear at Appendix D, *infra*. This suit was summarily dismissed on the basis that the Commonwealth of Pennsylvania unlike its sub-divisions is immune from suit. This dismissal was affirmed by the Supreme

Court of Pennsylvania on the basis of sovereign immunity with one justice abstaining and two justices dissenting. Article I, Section XI of the Pennsylvania Constitution was interpreted to preclude suits against the State without legislative approval. The doctrine of "sovereign immunity" from suit has been abrogated by judicial decision in Pennsylvania as to all governmental entities including sub-divisions of the State except the Commonwealth of Pennsylvania itself.

This appeal follows.

REASONS FOR APPEAL

The federal questions presented in this case concern the constitutionality of permitting a State by interpretation of its Constitution, to insulate itself from civil liability for its own wrongful acts in failing to protect its citizens from an industrial hazard in violation of its own legislative mandate, when no other entity, including the State's own political sub-divisions are so immune. Conversely stated, can a State through interpretation of its Constitution, place itself in a separate and individual classification without a rational and judicially cognizable basis therefore so as to immunize itself from civil liability in an area which is not a historic governmental function without violating the United States Constitution, Fifth and Fourteenth Amendments.

These questions have not been determined previously by this Court.

The doctrine of sovereign immunity has its origins in the English courts. *Russell v. The Men of Devon*, 100 Eng. Rep. 359 (1788). Even though this case was twelve years after American

independence, the doctrine was adopted by the courts of many of the United States. The doctrine and its errors of history, logic, and policy which were responsible for its development have been criticized and exposed time and again. However, certain of the State courts, including those of Pennsylvania, have continued to follow this outmoded theory apparently feeling bound by *stare decisis* unless changed by legislation. *Brown v. Commonwealth of Pa.*, 305 A.2d 868 (1973). Article I, Section XI of the Pennsylvania Constitution has been interpreted in this case to preclude suit against the State by reading into that provision the doctrine of sovereign immunity.

Sovereign immunity may be applied to the traditional functions of governmental policy and decision-making. However, the scope of the protection of the doctrine should extend no further. The State, not the injured party, who can ill afford the unjust costs imposed upon him, must and should be liable for its agents' tortious acts.

Several justices of the Supreme Court of Pennsylvania have recognized the necessity for this distinction. Justice Pomeroy, in his dissenting opinion in *Laughner v. Allegheny County*, 456 Pa. 607, 261 A.2d 607, 610, points out that:

> "The law of torts has traditionally served to relieve the innocent victims of accidents of the burden of their losses, and recent developments in the law of torts and the fact of widespread insurance coverage have increasingly had the effect of distributing such losses more broadly through society, to those who benefit from a given activity or to those who choose to pool their own risks. The effect of the governmental

> immunity doctrine has been to remove from the normal operation of tort law a large area of accident-producing activity. As governmental bodies become larger, as they multiply with the population, as more services are demanded of them and they become more pervasive, their insulation from liability becomes more significant and more serious."

Justice Roberts, in his majority opinion, in *Ayala v. Philadelphia Board of Public Education*, 305 A.2d 877, 881, noted that:

> "'. . . it is almost incredible that in this modern age of comparative sociological enlightenment and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.' *Barker v. City of Sante Fe*, 47 N.M. 85, 136 P.2d 480, 482. Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based."

Once it is recognized that an innocent person can be injured through the tortious act of officers of a State, how can a State court by interpreting its constitution then tell those persons that the State shall not be held responsible for its acts and omissions that led to their injury? History, as well as policy considerations dictate the need for the restriction of sovereign immunity.

Governmental immunity has been generally defended on grounds of policy. These arguments are bottomed on four basic principles. The first is that taxes are collected as a public purpose fund and they should never be used to compensate private injury. Second, is that an adverse effect would be created upon that governing instrumentality as to public service and safety functions without this immunity. The last two principles deal with alleged embarrassing difficulty and loss which might befall the sovereign, and that, after all, the sovereign is a nonprofit corporation. Harper and James, *The Law of Torts*, Section 29.3. The authors answered these arguments by stating that (1) where potential injury can be foreseen, funds for compensation should be considered normal costs of operation; (2) "while control of government activity by private tort litigation may be involved where the alleged tort is legislative action or the making of some high-level policy decision, no such theory is involved in ordinary accident cases"; (3) individual losses at present are much greater than if a sovereign made payment and distributed the expense upon those who benefit from government; (4) "Though the government as an entity does not profit from its enterprises (it is devoutly to be hoped) the taxpaying public does, and it is the taxpaying public which would bear the costs of government tort liability."

While the policy grounds for preserving sovereign immunity are weak, at best, there exist at least four reasons why States in particular should be subject to the policy of effective redress in tort.

> "(1) The state is in a position to cause injuries similar to those caused by an individual or corporate defendant and individual equity requires redress without regard to the nature of the defendant.
>
> (2) The state because of its legitimized right to use force against its citizens and because of certain unique functions which it performs [e.g. safety and health inspection] has a greater capacity to cause injury than an individual or corporate defendant and individual equity requires redress for injury against this added potential.
>
> (3) A consistently developed theory of governmental responsibility for injury caused will more likely be produced when imposition of liability is not determined by the potential defendant.
>
> (4) Effective state liability in tort provides a needed institutional channel for social change." Harring, *State Immunity from Suit Without Consent — Scope & Implications*, Wisconsin Law Review 1971, page 879.

Other considerations also dictate that the doctrine should at least be restricted.

Sovereign immunity has "the effect of encouraging laxness and a disregard of potential harm, exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions." Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal,* 52 Minn. L. Rev. 1047, 1057 (1968). Prosser has also indicated the need for governmental responsibility since:

> "The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive." Prosser, *Intentional Infliction of Mental Suffering: A New Tort,* 37 Mich. L. Rev. 874 (1939).

Only by making the State responsible for its acts can the injustices caused by the carelessness of the State and its agents be curbed. Until action is taken, countless people will be subjected to unnecessary harm and suffering with no remedy by due course of law.

Justice and policy require a departure from the broad doctrine of sovereign immunity. The State is supposed to serve the people not harm them. Justice demands action. Only action on the part of the judiciary will promote the cause of justice. The question is no longer should we act but now may we act to do what is just. Since the State Legislatures such as Pennsylvania refuse to act and the courts of those inacting States place the onus upon legislative action to do away with this judicially created anachronism, the Court must do so. Before the Court refuses to act it should remember, as was pointed out by Justice Black of Michigan, in *Williams v. City of Detroit,* 364 Mich. 231, 241, 111 N.W.2d 1, 10, "Sins of cold-blooded omission invariably average out to greater error than sins of warmhearted commission."

The Supreme Court of Pennsylvania has recently abolished, in *Ayala, supra,* the antiquated doctrine of governmental immunity as being "devoid of any valid justification." The doctrine of sovereign immunity is equally devoid of any valid justification and must be less broadly interpreted.

The statutory promulgation of the court-made law of sovereign immunity is placed in Article I, Section XI of the Pennsylvania Constitution.

> "All courts shall be open; and every man for injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in

such courts, and in such cases as the Legislature may by law direct."

Only by interpreting the Constitution in a constitutionally correct manner can the doctrine of sovereign immunity be put in its proper historical context. As Mr. Justice Manderino of the Pennsylvania Supreme Court stated in *Brown, supra:*

> "There is no sovereign in constitutional government — except the people. How can the state have any immunity if the people didn't authorize it? How could the people have authorized it if it is not in the written constitution? How can the written constitution be interpreted to contain something which it clearly does not? How can three words in the people's constitution be used to breathe life into a corpse which we buried centuries ago without shedding tears?

In the name of three misinterpreted words, we cannot allow special privileges by which some citizens injured by government shall have a remedy and not be denied right and justice (first sentence of Section II), while other citizens are denied any remedy and are denied right and justice.

The concept that the state is sovereign has been dead for centuries. The corpse was not given any immunity by the people in the Pennsylvania

Constitution. This Court should finally recognize the realities of history."

Justice Manderino, at page 875 in *Brown, supra,* also stated that sovereign immunity is a "judicially created doctrine, which does not and never had any legitimate roots in constitutional government. . . . It is a doctrine which has no support in the written constitution of Pennsylvania and never had."

Since sovereign immunity is a judicially created doctrine it can be changed by the courts. Cardozo in *The Growth of Law* at pages 136-137 (1924), stated:

> "A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express mores of the day, may be abrogated by the courts when the mores have so changed as to do violence to the social conscience."

The time has come for the Court to finally rid the Commonwealth of Pennsylvania and those other States adhering to the doctrine of sovereign immunity of one of these hoary inequities. Legislative failure combined with judicial inaction have visited pain and penury long enough.

> "When a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . There should be greater readiness to abandon an untenable

> position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years." Cardozo, *The Nature of the Judicial Process*, pp. 150-151 (1921).

The courts of California and Wisconsin realized that application of the doctrine of *stare decisis* does not rigidly command that we follow without deviation earlier pronouncements which are unsuited to modern experience and which no longer adequately serve the interests of justice.

The California Constitution, then Article 20, §6, now Article 3, §5, reads:

> "Suits may be brought against the state in such manner and in such courts as may be directed by law."

The California courts had consistently held that "whether the doctrine of sovereign immunity should be modified in this state is a legislative question." *Tally v. Northern San Diego Hospital Dist.*, 41 Cal. 2d 33, 41 (15), 257 P.2d 22 (1953). See also: *County of Butte v. Superior Court*, 178 Cal. App. 2d 310, 311, 2 Cal. Rptr. 913 (1960) (hearing denied); *Ingram v. County of Glenn*, 177 Cal. App. 2d 649, 650 (1, 2), 2 Cal. Rptr. 304 (1960); *Durst v. County of Colusa*, 166 Cal. App. 2d 623, 625 (1), 333 P.2d 789 (1958) (hearing denied); *Madison v. City and County*

of S.F., 106 Cal. App. 2d 232, 244-245, 234 P.2d 995, 236 P.2d 141 (1951) (hearing denied); *Latham v. Santa Clara County Hospital*, 104 Cal. App. 2d 336, 337 (1), 231 P.2d 513 (1951) (hearing denied).

In 1961, the California Supreme Court cast the entire doctrine into certain oblivion in the case of *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961). The Court swept away all vestiges of governmental immunity in words which made it clear that no level of government in the State could any longer rely upon the "governmental" nature of its functions as a defense to tort liability. Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. of Ill. L. F. pp. 919, 936.

Justice Trayner, speaking for the majority in *Muskopf* stated:

> "Only the vestigal remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our laws, we make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend." *Muskopf, supra*, p. 463.

Change in the concept of sovereign immunity was also achieved in Wisconsin by judicial action. Article IV, §27 of the Wisconsin Constitution provides:

> "The legislature shall direct by law in what manner and in what court suits may be brought against the state."

In response to the argument that a change in the doctrine of sovereign immunity could only be achieved through the legislature the Wisconsin Court, in *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W. 2d 618, 623, stated:

> "We recognize that earlier decisions of this court contemplated precisely that. See *Flamingo v. Wankesha* (1952), 262 Wis. 219, 228, 55 N.W. 2d 24 (concurring opinion); *Britten v. Eau Claire* (1951), 260 Wis. 382, 386, 51 N.W. 2d 30.
>
> Not only have we previously expressed the view that any proposed change should be directed toward the legislature, but we also have expressed the view that the legislature's failure to enact a bill which has been introduced constituted '. . . an expression by the legislature that no change should be made. . . .' *Schwenkhoff v. Farmers Mut. Automobile Ins. Co.* (1959), 6 Wis. 2d 44, 47, 93 N.W. 2d 867, 869.
>
> We are satisfied that the governmental immunity doctrine has judicial origins. Upon careful consideration, we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments."

In outlining the scope of the decision, Mr. Justice Gordon in *Holytz* stated:

> "Perhaps clarity will be afforded by our expression that hence forward, so far as government's responsibility for torts is concerned, the rule is liability — the exception is immunity. . . . The case at bar relates specifically to a city; however, we consider that abrogation of the doctrine applies to all public bodies within the state; the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivisions of the state — whether they be incorporated or not. By reason of the rule of respondent superior a public body shall be liable for damages for the torts of its officers, agents and employees occurring in the course of the business of such public body."

The Pennsylvania courts have consistently called upon the legislature to act in the area of sovereign immunity. As pointed out above the situation was the same in Wisconsin and California. The legislatures in these two States finally did act but only as a reaction to a court decision. California passed the California Tort Claims Act of 1963, Cal. Gov't. Code, §§810-

996.6 (West 1966). The Wisconsin Legislature's reaction was the passing of Wis. Stat. Ann., §895.43. These experiences of other States indicate that the legislatures react only after judicial action. The Court should no longer be patient. Reform is needed and it has not come from the legislatures of most States including Pennsylvania.

Stare decisis should be no bar to the courts reinterpreting the doctrine of sovereign immunity. Mr. Justice Klingbiel pointed out in *Molitor v. Kaneland Community Unit District No. 302*, 163 N.E. 2d 89, 96, 18 Ill. 2d 11:

> "It should be borne in mind that we are not dealing with property law or other fields where stability and predictability are of utmost concern. We are dealing with torts where there can be little, if any, justifiable reliance and where the rule of stare decisis is admittedly limited."

The present situation demands that the State accept the responsibility of its failure to act which has resulted in the crippling of two men along with the countless others who have been injured because of the State's carelessness.

Article I, Section XI of the Pennsylvania Constitution, on its face, and as it was applied by the Pennsylvania Supreme Court, unconstitutionally discriminates against the victims of State acts of negligence. Sovereign immunity, as it is interpreted in Pennsylvania, violates the Fifth and Fourteenth Amendments guarantee of due process and equal protection.

Mr. Justice Harlan pointed out in *Boddie v. Connecticut*, 401 U.S. 373, 9 S. Ct. 780, 784 (1971), that:

> "The right to due process reflects a fundamental value in our American constitutional system. . . . Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner . . . in the 5th Amendment, and later those who drafted the 14th Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee, that one may not be deprived of his rights, neither liberty or property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through the years put flesh upon the due process principle."

As the law now operates in Pennsylvania, "All Courts shall be open; and every man for an injury done him . . . shall have a remedy by due course of law, and right and justice administered without sale, denial or delay," unless of course, the wrong done was committed by the State or its agents. Then due process, predictability and ordered rights are nice phrases spoken by

Justice Harlan but not a fundamental right in Pennsylvania. The Pennsylvania courts have continually and unjustly denied the right to a remedy to one class of people.

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tinger v. Texas,* 310 U.S. 141, 147, 60 S. Ct. 879, 882, 84 L. Ed. 1124. But, "the guaranty of equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins,* 118 U.S. 356, 369, 6 S. Ct. 1064, 1070, 30 L. Ed. 220.

"When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner v. Oklahoma ex rel. Williams,* 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655.

In *Leger v. Sailer,* 321 F. Supp. 250 (1970), the court stated:

> "The Fourteenth Amendment does not prohibit all classifications in state laws, it requires that such classifications between groups of persons have a legitimate state objective, and the distinction drawn have a rational purpose."

If, however, "the classification touches on a fundamental right . . . its constitutionality must be judged by a stricter

standard of whether it promotes a state interest." *Shapiro v. Thompson,* 394 U.S. 618, 638, 89 S. Ct. 1322, 1333 (1969).

The monetary explanations offered to justify sovereign immunity, although they might possibly be considered rational and a permissible State objective are not adequate to justify the classifications set up by the State. Experience has shown that States which have abolished sovereign immunity have not met with financial ruin. More importantly, it was noted by this Court in *Shapiro, supra,* at page 1330, that the "saving of . . . (welfare) costs cannot justify an otherwise invidious classification."

The majority of the Pennsylvania Court, in *Brown, supra,* stated that: "because Article I, Section XI is not self-executing, and because no classification is possible without legislative implementation, this constitutional provision cannot be considered discriminatory for equal protection purposes." That Court argued that since no one can bring a suit against the State without its consent, there is no discrimination. Such reasoning, however, ignores the fact that negligence suits can be brought against private entities and all other governments in Pennsylvania. The Constitution when read as a whole guarantees remedy to all people. The State has, however, interpreted the second part of its constitution to deny a remedy to a class of society, those injured by the State. Such a reading is violative of equal protection of the laws as recognized by this Court in *Brown v. Board of Education,* 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). A separate class has been created. Just because all persons are barred from bringing suit against the State does not make the statute non-discriminatory. People within the classes may be equal, but two separate classes still

exist and one of the classes is deprived of the fundamental right to a remedy at law.

This Court in *Brown v. Board of Education, supra,* p. 691, when addressing the problem of a child's right to an equal education stated:

> "Such an opportunity where the state has undertaken to provide it is a right which must be available to all on equal terms."

In Pennsylvania, the people who are the sovereign, have done more than "undertaken to provide" a remedy by due course of law. The people have guaranteed themselves this right in their Constitution in Article I, Declaration of Rights of the People. The Pennsylvania Court allows the State to invidiously discriminate against an arbitrary class of people by not allowing them to redress their wrongs.

Equal protection of the law is violated when two people in the same substantive position are treated differently. If two people are standing on a corner and one is run over by a State truck and the other by a privately owned truck, how can we say that it is not discriminatory for one not to have the right to bring his claim to Court.

The Pennsylvania courts can, no longer, cling to the proposition that it is not discriminatory to treat incidents of negligence differently because the State is involved in one and not in the other. To do so would be to ignore the United States Constitution, the Pennsylvania Constitution, and the rulings of the Court on due process and equal protection.

Not only is the general question of sovereign immunity substantial, but in the particular context of this case the question is one of pervading federal concern. We are here faced with the tortious failure of a State to assume its own legislative mandate to ensure industrial safety and provide its citizens with a safe environment in which to work. The failures so to do by Pennsylvania were at a time and of such a nature as to impinge upon an area of existing and pronounced federal concern. The Williams-Steiger Occupational Safety and Health Act of 1970, 29 U.S.C. §651-678 (1971), is the codification of federal policy to assure workers safe and healthful working conditions. Pennsylvania by its inactions and failures to police appellants employer and require safe working conditions and removal of a known hazard coupled with application by the Pennsylvania courts of the doctrine of sovereign immunity to this case effectively abrogates any control over how well a State performs its function in this important area.

CONCLUSION

The right of a workman to be secure that his place of employment is safe and that his State not evade its obligation to him by the judicially anachronistic cloak of "Sovereign Immunity" is essential. Once a State government assumes the role of protecting its workmen it does so full well knowing that this assumption of duty carries with it a responsibility which cannot be abrogated without violating the constitutional safeguards of due process and equal protection under the law. Article I, Section XI of the Pennsylvania Constitution as interpreted by the Supreme Court of Pennsylvania is unconstitutional.

It is respectfully submitted that in the event this Court determines this appeal to have been improvidently taken under 28 U.S.C. §1257(2), that, pursuant to 28 U.S.C. §2103, the public issues are so substantial in nature as to permit the review of this matter as a petition for writ of certiorari under 28 U.S.C. §1257(3).

Respectfully submitted,

Lewis Kates
Joseph R. Livesey

KATES, LIVESEY & EDELSTEIN
Attorneys for Appellants

APPENDIX A — OPINION OF THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 362 January Term, 1974

Appeal from the Order of the Commonwealth Court of Pennsylvania at No. 12 T.D. 1973

CALVIN WILLIAMS and JOSEPH McNEIL

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY AND DEPARTMENT OF HEALTH

PER CURIAM: FILED: MARCH 18, 1975

Order affirmed. See Brown v. Commonwealth, 453 Pa. 566, 305 A. 2d 868 (1973).

Mr. Justice Manderino took no part in the consideration or decision of this case.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice Nix joins.

APPENDIX B — DISSENTING OPINION OF JUSTICES ROBERTS AND NIX

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 362 January Term, 1974

Appeal from the Order of the Commonwealth Court of Pennsylvania at No. 12 T.D. 1973

CALVIN WILLIAMS and JOSEPH McNEIL,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY and DEPARTMENT OF HEALTH

ROBERTS, J. FILED: MARCH 18, 1975

The Court today continues to permit a judicially created anachronism to deprive litigants of their day in court. I remain of the view that the doctrine of sovereign immunity ought, in its entirety, to be consigned to the judicial scrapheap. See *McCoy v. Commonwealth*, __Pa. ___, 326 A.2d 396, 397-98 (1974) (dissenting opinion of Roberts, J., joined by Nix & Manderino, JJ.); *Sweigard v. Pennsylvania Dep't. of Transp.*, 454 Pa. 32, 35-38, 309 A.2d 374, 376-77 (1973) (dissenting opinion of Roberts,

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J., joined by Nix & Manderino, JJ.); *Brown v. Commonwealth*, 453 Pa. 566, 577-79, 305 A.2d 868, 871-72 (1973) (dissenting opinion of Roberts, J., joined by Nix & Manderino, JJ.); *Biello v. Pennsylvania Liquor Control Bd.*, 454 Pa. 179, 187-92, 301 A.2d 849, 853-56 (1973) (dissenting opinion of Nix, J., joined by Roberts, J.).

MR. JUSTICE NIX joins in this dissent.

APPENDIX C — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 12 T.D. 1973

CALVIN WILLIAMS and JOSEPH McNEIL,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY, and DEPARTMENT OF HEALTH,

Defendants.

OPINION BY JUDGE BLATT, March 5, 1974:

This is an action in trespass against the Commonwealth of Pennsylvania and two of its agencies, the Department of Labor and Industry and the Department of Health. The plaintiffs, Calvin Williams and Joseph McNeil, claim that they contracted manganese poisoning at their place of employment because of the negligence of the defendants and that, as a result, they have become and will be in the future permanently disabled. They allege that the defendants have breached a statutory duty relative to safeguarding the health and safety of all Commonwealth employees pursuant to Section 2202 of the

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Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §562 in that they (1) failed to notify plaintiffs of the dangers of manganese, (2) failed to close the dangerous operation, (3) allowed inadequate protective methods, (4) failed to mandate physical examinations of all employees, and (5) failed to correct or see to the correction of the dangerous and hazardous conditions at the plant.

The defendants now raise preliminary objections, which claim lack of jurisdiction by asserting the doctrine of sovereign immunity, and are also entered by way of a demurrer, and, upon careful consideration of these objections, we must dismiss the plaintiffs' complaint.

As the law now stands sovereign immunity is a viable doctrine, mandated by Article I, Section 11 of the Pennsylvania Constitution, and this doctrine has not been waived by the Legislature, the only branch of the State government able to waive it. *Brown v. Commonwealth*, 453 Pa. 566, 305 A.2d 868 (1973). The defendant Departments are agencies of the Commonwealth who allegedly acted or failed to act in a governmental capacity and they are similarly clothed with immunity. *Biello v. Pennsylvania Liquor Control Board*, 454 Pa. 179, 301 A. 2d 849 (1973).

We are bound by the decisions of our Supreme Court, *Duquesne Light Co. v. Department of Transportation*, 6 Pa. Commonwealth Ct. 364, 295 A. 2d 351 (1972), and must affirm the constitutionality of sovereign immunity as enunciated in *Brown*, supra, and as we find it applicable in this case.

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Because of our disposition of this issue it is unnecessary for us to discuss the defendants' demurrer in directing the following

O R D E R

NOW, March 5, 1974, the complaint of the plaintiffs is hereby dismissed.

APPENDIX D — DOCKET ENTRIES AND RELEVANT PLEADINGS

DOCKET ENTRIES

FOR PLAINTIFF: Joseph R. Livesey, Esq., Kates, Livesey & Edelstein, 3220 Philadelphia Savings Fund Bldg., Philadelphia, Penna. 19107

Apr. 26, 1973	On Order, it is hereby ordered that said case be transferred to this Court. The Prothonotary of the Court of Common Pleas of Philadelphia County is hereby directed to transfer to the Chief Clerk of this Court the record of said case entered to No. 133 January Term, 1973 in the Court of Common Pleas of Philadelphia County. (J. Bowman) See Order filed.
Apr. 26, 1973	Record received and filed.
May 4, 1973	Preliminary Objections filed.
May 9, 1973	Answer to Preliminary Objections of Defendant filed.
Nov. 7, 1973	Brief for defendants filed.
Nov. 19, 1973	Brief for Plaintiffs filed.

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Dec. 3, 1973	Argued before court en banc.
Mar. 5, 1974	On Opinion, Order, the complaint of the plaintiffs is hereby dismissed. (J. Blatt) Opinion Exit.
Mar. 21, 1974	Certiorari sur appeal from the Supreme Court to No. 362 January Term 1974 returnable forthwith filed.

COMPLAINT IN TRESPASS

1. Calvin Williams, one of the Plaintiffs herein, is an individual residing at 7222 North 21st Street, Philadelphia, Pennsylvania.

2. Joseph McNeil, the other Plaintiff herein, is an individual residing at 4524 North Gratz Street, Philadelphia, Pennsylvania.

3. The Commonwealth of Pennsylvania (hereinafter referred to as "Commonwealth") one of the named defendants herein, is a State of the United States of America with its capital located at Harrisburg, Pennsylvania.

4. The Department of Labor and Industry and the Department of Health, both named defendants herein are agencies of the Commonwealth of Pennsylvania, which have delegated to them by the said Commonwealth certain prescribed powers and affirmative duties relating to safeguarding the health

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and safety of all employees who work within the Commonwealth.

5. At all times hereinafter mentioned the E. J. Lavino Division of International Mineral and Chemical Corporation (hereinafter "Lavino") not a named defendant herein, was engaged in the processing of manganese ore at its industrial location at 2821 Richmond Street, Philadelphia, Pennsylvania.

6. The Plaintiffs herein were for some time prior to January, 1971, employed by Lavino and were engaged in the handling and processing of manganese ore at the manufacturing plant of Lavino located at 2821 Richmond Street, Philadelphia, Pennsylvania.

7. Manganese ore is a toxic, corrosive, noxious, harmful, deleterious and poisonous substance, which fact was not made known to the Plaintiffs herein at the time they were hired or at any time thereafter.

8. Pursuant to Section 2202 of the Administrative Code, Act of April 9, 1929 P.L. 177, Art. XXII, §2202; 1956 April 12, P.L. (1955) 1467, §1, 71 Purdons Pa. Stat. Ann. §562, the Commonwealth delegated to the Department of Labor and Industry certain prescribed duties relative to safeguarding the health and safety of all Commonwealth employees:

> (g) "to receive reports of industrial accident to persons, and to direct the investigation of such accidents, and prescribe means for the prevention of similar accidents;"

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(h) "to issue orders for removing or safe-guarding against hazards that may cause accidents to employees, as may now or hereafter be provided by law."

9. Over a period of time beginning in or about 1965 the defendants directed an investigation of Lavino with respect to industrial and plant hygiene and safety for the purpose of prescribing means for the prevention of industrial accidents or illnesses of the employees working at the aforementioned industrial facility.

10. From 1965 until the latter part of 1971 numerous and exhaustive surveys were made by the defendants to evaluate and determine how much exposure to manganese the employees working at the Lavino industrial facility were receiving.

11. Although the results of these surveys showed in most instances that the amount of manganese dust in the air exceeded health and safety standards and was therefore dangerous to the health of the employees therein, the defendants were negligent in failing to take adequate steps to correct these dangerous conditions as follows:

a) in failing to notify the Plaintiffs herein of the hazards and dangers of the excessive amount of manganese dust and manganese particles existing at the Lavino plant.

b) in failing to mandate that the Lavino plant shut down its operations pending correction of the dangerous conditions existing therein.

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c) in allowing Lavino to prescribe alleged protective air filtration equipment and dust masks for the plant and its employees, including Plaintiffs herein, when defendants knew or should have known that such measures were inadequate, were harmful and did not properly protect the employees of the plant from harmful effects of the manganese dust and manganese particles.

d) in failing to adequately determine the identity of all Lavino employees who may have suffered or would be suffering injury as a result of manganese poisoning and further, in failing to mandate immediate physical examinations of all individuals possibly involved.

e) in otherwise failing to correct or see to the correction of the hazardous and dangerous conditions at the Lavino plant which existed over such an extensive period of time.

12. As a direct result of the negligence and in-action of the defendants herein, the Plaintiffs, Calvin Williams and Joseph McNeil contracted manganese poisoning in or about February, 1971 and as a result of said poisoning the Plaintiffs herein have become and will be in the future permanently disabled; that the plaintiffs have been hospitalized and have required medical attention in attempting to cure said disease and will require medical attention in attempting to cure said disease and will require medical attention and hospitalization in the future; that the plaintiffs have suffered injuries to their brain and to other motor functions as well as to their nerves and nervous system,

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all of which will be permanent and painful to the plaintiffs herein; that the plaintiffs cannot obtain any gainful employment and have suffered and will continue to suffer in the future from the effects of the manganese poisoning; the plaintiffs herein cannot enjoy life nor the comfort and society of their wives and family.

WHEREFORE, each of the plaintiffs demand judgment against the defendants individually, jointly and/or severally in an amount in excess of Ten Thousand Dollars ($10,000.00).

KATES, LIVESEY & EDELSTEIN

BY:
JOSEPH R. LIVESEY
Attorney for Plaintiffs

PRELIMINARY OBJECTIONS

Defendants, by their attorney, Glenn Gilman, object to plaintiffs' complaint for the following reasons:

Lack of Jurisdiction

1. Plaintiffs' complaint names the Commonwealth of Pennsylvania and two of its agencies exercising governmental functions as defendants in the above captioned matter, in violation of Article I, Section 11 of the Constitution of Pennsylvania, said section prohibiting the bringing of suits

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against the Commonwealth without its consent. This is the doctrine of sovereign immunity.

Demurrer

2. The complaint fails to state a claim against defendants upon which relief can be granted.

WHEREFORE, defendants request that plaintiffs' complaint be dismissed for lack of jurisdiction over the person and for failure to state a cause of action.

Respectfully submitted,

Glenn Gilman
Assistant Attorney General

Michael von Moschzisker
Deputy Attorney General
Eastern Regional Director

Israel Packel
Attorney General

206 State Office Building
Philadelphia, Pa. 19130
Phone: (215) 238-6661

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ANSWER TO PRELIMINARY OBJECTIONS OF DEFENDANT

1. It is denied that the plaintiffs' cause of action against the defendants, individually or severally is barred by the doctrine of Sovereign Immunity under the facts of this case. In the alternative it is averred that the Doctrine of Sovereign Immunity should no longer be the law of this Commonwealth and should be over-ruled.

2. The Plaintiffs' Complaint sets forth a cause of action against the defendants, individually and severally. The complaint by its very terms, spells out that the Plaintiffs were severally and permanently injured as a result of the gross negligence of the defendants in their failure to perform their duties to the Plaintiffs as is fully set forth in the Complaint.

JOSEPH R. LIVESEY, ESQ.
Attorney for Plaintiffs